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Human rights in procedural democracies: a contribution to the debate

*Os direitos humanos nas democracias procedimentais:
uma contribuição para o debate*

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Resumo

Se os direitos humanos encontram ambiente de desenvolvimento inseguro nos regimes cujas escolhas públicas são orientadas pelas regras de mercado, também encontram ambiente frágil na democracia liberal. A democracia liberal – descritiva, procedimental e até certo ponto minimalista, preocupada prioritariamente em assegurar formalmente as liberdades individuais clássicas – enfrenta na atualidade aguda crise, com suas históricas conquistas sendo ameaçadas por ideias populistas e antidemocráticas. O presente artigo, dialogando com os estudos sobre democracia e liberalismo, analisa a relação entre a democracia liberal e os direitos humanos, para, ao final, apontar a necessidade de que a democracia, para a sua própria sobrevivência, alargue seus horizontes rumo à promoção dos direitos humanos para além das liberdades clássicas, visando à construção de uma sociedade materialmente igualitária.

Palavras-chave: democracia; liberalismo; crise; direitos humanos; populismo.

Abstract

If human rights find an unsafe development in regimes whose public choices are guided by market rules, they also find a fragile development in liberal democracy. Liberal democracy – descriptive, procedural and to some extent minimalist, primarily concerned with formally securing classic individual freedoms – now faces an acute crisis, with its historic achievements threatened by populist and undemocratic ideas. This article, in dialogue with studies on democracy and liberalism, analyzes the relationship between liberal democracy and human rights, in order, in the end, to point out the need for democracy, for its own survival, to expand its horizons towards the promotion of human rights beyond classical freedoms, with the aim of building a materially egalitarian society.

Keywords: democracy; liberalism; crisis; human rights; populism.

Contents

1. Introduction. 2. Neoliberal thinking and human rights. 3. Procedural perspective of democracy and human rights. 4. Liberal democracy and human rights. 5. Conclusion: democracy with human rights and development. References.

1. Introduction

The idea of human rights is controversial, with no precise consensus around its definition, its contours, and even its existence, although it is commonplace, however, to align the various theoretical aspects that seek to explain them in two large groups, the universalists and the relativists.

Universalists often cling to conceptions that refer to jusnaturalist postulates, according to which human rights, inherent to the human condition, would be the product of natural laws, constituting a single moral code, assisting human rights to all people simply in virtue of its humanity, which would justify its aspiration to universality (TRINDADE, 2003).

In this sense, human rights would present, as explained by Peterke (2013), a notably individualistic character, and they can even be conceived as pre-State rights, which assist every human person because of their dignity as a person.

With some variation, universalism also includes other theoretical aspects, according to which the different peoples would present different moral codes, sharing, however, some common values, which would become the basis of human rights, constituting such theories, with some variation among themselves, the *agreement theories*, in the words of Beitz (2009, p. 73-95).

For Trindade (2003, p. 36-38), in an assertion that well represents the center of universalist conceptions, universal human rights standards can be found even in the midst of cultural diversity, since human rights would have the universal legal awareness.

The universalist position is emphatically criticized by theorists with a decolonial approach, such as, for example, Santos Junior (2016), for whom these liberal universalist conceptions of human rights are nothing more than the product of a hegemonic discourse of an eurocentric matrix, where humans of humans rights invariably are white, heterosexual, Christian and bourgeois. Even so, even for its critics, the hegemonic discourse of human rights is better than none (SANTOS JUNIOR, 2016, p. 198).

Relativists, on the other hand, with some variations, start from a pragmatic conception of opposition to the jusnaturalist view, taking human rights as a cultural product, the result of a continuous historical-social construction, according to which human rights must be based on different social practices, taking into account human beliefs, intentions and experiences, since due to the compromises inherent to social life, human beings not only self-build, but also self-regulate (ÁVILA, 2014, p. 305).

There are still those who are suspicious of the very existence of human rights. In this sense, Freitas (2012, p. 233) argues that if every right is a human product, and if, in this perspective, there is no non-human right, what could be so specific about human rights that other rights as a whole would

differ from them? For Freitas (2012, p. 228), even relativism or historicism are not enough ways to explain human rights.

Here, too, it should be noted that even those who are suspicious of the existence of human rights consider that, despite everything, and perhaps because of their rhetoric, human rights end up promoting some specific achievements beyond all their insufficiency (FREITAS, 2012, p 238).

Beitz (2009), in a work specifically focused on the theme, explains human rights in a contemporary way, as a social practice, a political discourse, a public policy project with specific purposes and means of action that aims to play a certain role in global political life, having as content the protection of interests whose urgency and the broad scope of which justify considering them as a political priority, capable of arousing the interest of the international community when not satisfied at the internal level of a given State.

Human rights, therefore, “are standards for the governments of states whose breach is a matter of international concern” (BEITZ, 2009, p. 31-32), a definition that implies the role of international organizations and the international community in systems accountability regarding the practice of human rights, which always raises the question of the legitimacy of these bodies.

Whatever the understanding of human rights of those who believe in the validity of the category, there seems, however, to be a complementary and mutually reinforcing relationship between human rights, democracy and development. Beyond the universal notion of the content of rights and beyond a recipe for democracy, the human rights category seems to contribute, even more in democracies that exceed the rights of freedom, with development.

Also from the perspective of democratic socialism, human rights seem to be a prominent place. The thought that proposes the necessary connection between socialism and democracy and that interprets socialism as the development and deepening of liberalism's human rights is now dominant in Marxist thought in western Europe and America (ATIENZA, 2012, p. 41).

Democracy, in this way, in political liberalism or in democratic socialism, would be the fertile ground for the realization of the human right to development, a topic that was the object of particular consideration in the debates of the II World Conference on Human Rights, held in Vienna, Austria,

in 1993, whose Final Declaration emphasized the robust links between democracy, development and human rights.

Indeed, this complementary and mutually reinforcing relationship between democracy, development and respect for human rights is expressly evidenced in several of the paragraphs of Operative Part I of the Vienna Declaration and Program of Action, the main document resulting from the Vienna Conference, with emphasis on paragraph 8, according to which “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”, and on paragraph 74, according to which “actors in the field of development cooperation should bear in mind the mutually reinforcing interrelationship between development, democracy and human rights”.¹

Trindade (2003, p. 237-238) points out that the Secretary-General of the United Nations at the time of the Conference, Boutros-Ghali, in his speech at the opening session of the event, stressed that the democratization process is inseparable from protection human rights, and that democracy should be assimilated by all cultures, as a good that must be shared by all, as a political expression of common heritage, concluding then the Secretary-General of the United Nations that only democracy gives meaning to development.

The question that arises is the concept of democracy, the extent of its elements and its relation to efficiency, taken as a magic word by the defenders of a neoliberal model of the State.² The issue of the position of human rights in a purely procedural conception of democracy must also be addressed. Finally, it is necessary to ask whether a liberal democracy guarantees the right to development.

The central problem of this article involves the search for answers to these questions, contributing to the debate, and, in the achievement of its objectives, this article will be structured in three parts. In the first part, the arguments of efficiency of the economic theories of democracy will be analyzed, notably of the neoliberal conceptions, averse to the political institutions. In the subsequent parts, the procedural and descriptive outlines of democracy and liberal democracy will be analyzed in separate chapters,

¹ The full Vienna Declaration and Program of Action is available for consultation on the United Nations Human Rights - Office of the High Commissioner website, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>>. Accessed on: 07. abr. 2020.

² Not all authors who use the concept of efficiency do so from a neoliberal perspective. See, for example: HACHEM, GABARDO, 2018.

with the article, in both stages, analyzing the place of human rights in its multidimensional expression in democracies so defined and how much it can impact the erosion of the democratic order and the rise of populist movements.

2. Neoliberal thinking and human rights

Especially since the end of the cold war, market-based thinking and the consequent logic of buying and selling began to enjoy unprecedented prestige around the world, with social life increasingly being guided by market values (SANDEL, 2019, p. 11). Human rights, as a State rhetoric, and the democratic model itself, come to be seen as an obstacle to the pursuit of individual happiness. Efficiency, and no longer equality, becomes the companion of freedom.

In the era of market triumphalism, would be democracy the government of the people, or even the government of the majority, or, even more specifically, as the set of electoral institutions with the power of law that translates the opinions of the people into public policies (MOUNK, 2019, p. 44), more efficient than the market in allocating resources and satisfying individual interests?³

According to Przeworsky (1995), neoliberal theories concentrate much of their criticism on the so-called democratic models of the median voter, ruling out the premise of the possibility of an ideal democracy, in which the voting citizens would form a homogeneous group and choose a level of activity that it would be optimally efficient for each and everyone, each being responsible for the per capita cost of these decisions, generating the political process a single result.

Based on the observations of Arrow (1963, p. 1), in capitalist democracies there are essentially two methods by which social choices can be made: voting, which is normally used for political decision-making, and market mechanism, generally used for making economic decisions.

Median voter model is that one in which the winning political proposal is the preferred one by the voter with the average preference, in decisions taken by the majority rule from a set of voters that differ in appropriations, incomes and preferences (PRZEWORSKY, 1995, p. 16-17).

³ On this matters, see: TAVARES, 2021.

While showing appreciable normative bias, insofar as the preferences of the median voter would govern, or at least should govern, public policies, even if disregarding that the will of the people is not always expressed rationally, median voter models find in the efficient postulates of the economic theories fierce obstacles.

Downs sustains (1999, p. 53), in this sense, that a preference considered good would not always be considered rational in the economic sense, so that good behavior can be so inefficient that its prevalence would destroy the very social state they desire, a possibility that, in itself, would already point to the fragility of democratic results from such a model.

In addition to this weakness, severe criticisms, generally supported by Arrow's Theorem, also point to the impossibility of finding rationality in collective decisions, restricting the issue of rationality to individual actions, so that it would be impossible to obtain a collective preference, rationally definable, that could reliably express the popular will.

In fact, according to Arrow (1963, p. 120), collective rationality in the social choice mechanism "is not then merely an illegitimate transfer from the individual to society, but an important attribute of a genuinely democratic system capable of full adaptation to varying environments". The transition from individual preferences to collective preferences does not, according to Arrow, satisfy the conditions of rationality, thus leaving the connection between popular sovereignty and collective rationality undone, a notion so dear to the first ideas of political representation.⁴

Sustaining itself in the ailments inherent to the democratic regime, generally considered to be inefficient and defective, the neoliberal current adopts as the central idea of its positions, as shown by Przeworsky (1995, p. 26-27), the position that market allocates resources for all uses more efficiently than political institutions, and that even if the market fails to function efficiently, there is no guarantee that the State would do better.

Some argue, even, that the decisions that affect the population are made by those with knowledge (BRENNAN, 2016), in an epistocracy where only the philosopher king would be lacking, as criticized by Dalton (2017, p. 213). However, even if State fails to function efficiently, there are no guarantees (nor historical examples) that market will do better for the whole community.

⁴ See SALGADO, 2020, p. 108.

In addition, it is necessary to problematize the concept of efficiency beyond the private sphere. Efficiency in the state field demands legitimacy (GABARDO, 2003) and shareable results based on equality. Thus, the argument of the electorate's lack of preparation, of its inability to make rational and informed decisions, which fits the elitist conceptions of democracy, does not fit into an inclusive democracy.

Commenting on the neoliberal position that points out that government interventions always introduce inefficiencies, argues Przeworsky (1995, p. 32-38), however, that this conclusion is based on an a priori preference for the market and on the unsustainable premise that society first finds some efficient point, that is, a point that rests on the Pareto border, and then the government enters, causing the appearance of deadweight losses and pushing the allocation of resources to a point lower than the original, still sustaining Przeworsky (1995, p 32-33) that not all resource allocations can be compared in terms of efficiency and that reduced income does not necessarily mean reduced social welfare.

In this same sense, Dalton (2017, p. 218) emphasizes that “democracy's goal is not to maximize efficiency, but rather to balance social interests and eventually make good (or at least better) decisions”, suggesting the empirical evidence that “an active public and good governance go together”.

About the alleged impossibility of establishing any rationality in collective decisions - also ruled out by Dalton and Klingemann (2011), yet another argument in favor of defining social choices based on political decisions, ponders Przeworsky (1995, p. 25) that impossibility theorems, based on the premise that individual preferences are given and remain unchanged during the political process, do not take into account that it is reasonable for individuals to change their preferences as a result of their mutual communication.

Moreover, it is important to consider that in States whose mechanisms for social choices and public policy definitions are primarily guided by market rules, disregarding individual and collective political preferences, human rights seem to be confined to environments of greater fragility and uncertainty, once that the degree of efficiency in their satisfaction cannot be measured exclusively by the alleged rationality of the rules inherent in the market procedure.

Indeed, as Sandel (2019) ponders, there are things that money cannot buy, reason why it is necessary, in the name of democratic vigor, a serious public debate about the moral limits of the market and about the role and reach of the market in everyday life social and human relations, because often democratic principles that should be respected, notably related to material equality, are discarded in the name of the prevalence of market values.

In the words of Sandel (2019, p. 19), a debate on the moral limit of the market would allow us to decide, as a society, under what circumstances markets serve the public good and under what circumstances they are intruders.

3. Procedural perspective of democracy and human rights

While pointing out the methodological misunderstanding of the neoliberal perspective and showing his a priori preference for the market, Przeworsky (1995) conceives democracy under a more minimalist, procedural, more descriptive than normative conception, where democracy identifies itself with a political arrangement, a method by which people select, by rational choice, among the available alternatives, governments, invariably corresponding such method to the mechanism of the elections.

Procedural democracy, therefore, is based on the majority principle as the basic content of the democratic regime, prioritizing the democratic process regardless of the results to be obtained, or, in other words, honoring the position of the winners, and not necessarily the common good or the interest of all (KOZICKI; BARBOZA, 2008).

Democracy has its strong point of support, therefore, when seen from a purely procedural point of view, in the respect for the rules of the game in decision-making, without major deontological concerns about the ethical or good content of the social choices derived from the political arrangement that divided winners and losers. Respect for the procedure, however, would tend to serve as many people as possible, as there is room for discussion and disagreement

In this view, it is possible to point to a regime as democratic when there are periodic elections, with a broad possibility of political participation in the process of choosing governments, reflecting the possibility of alternating in power.

Procedural democracy, therefore, presupposes the coexistence of antagonistic political groups and the possibility for each of them to come to power through free elections, with wide popular participation, with the right of public contestation and opposition being fully recognized, confusing their substance with its own rules of procedure, based on individual postulates of liberalism.

There would be no democracy, as Dahl (2005) reinforces, without the presence of two of its most essential dimensions, in this case, public contestation and the right to participate, in a way that a regime will be better on the path to democratization, the broader the right to participate in elections and public office and the safer public contestation procedures are.⁵

Procedural democracy, therefore, reverses the axis by prioritizing, even in the capitalist system, voting as a method by which social choices will be, to the detriment of the market mechanism, here using Arrow's terms (1963), although it is not always possible to discern an insurmountable gap between both methods in the formulation of public policies.

It would be incorrect to think that procedural democracy, focusing more on the means than the ends, is an infertile ground for securing rights. Far from it, it is in the democracy thus considered that those rights of the first dimension, or of the first generation, which are deeply identified with the liberal aspirations that founded modern constitutionalism, are most powerful and effective.

It is unfair, perhaps for that reason, to point out that procedural democracy is exclusively minimalist, since, when linked to the liberal idea of guaranteeing rights, such as the rights to participate in elections and contestation, its contours may not be as minimalist as it is usually propagated, given the importance of this framework of freedoms.

In fact, according to Dahl's model (2005), the wide possibility of participation in elections and the liberal guarantee of public opposition are the minimum marks that serve to characterize regimes as democratic, approximating to the polyarchies the regimes in which participation in elections is as broad as possible and at the same time public contestation is as fully as possible ensured.

⁵ To substantially popularized and liberalized regimes, that is to say, strongly inclusive and widely open to public contestation, says Dahl (2005) that can be thought of as relatively (because incompletely) democratic regimes, which he named *polyarchies*. For Dahl (2005, p. 31), democracy may eventually involve more than these two dimensions, and, because of that, he points out that no major system in the real world is fully democratized.

By identifying, therefore, in its current procedural conceptualization, almost exclusively with political institutions and rights such as free and fair elections, universal suffrage, wide access to public offices, protection of individual freedoms such as freedom of expression, opinion, of association and contestation, democracy shows strong attachment to liberal ideas, showing itself, at the same time, deficient as a regime capable of promoting human rights considered in its multiple dimensions, since it only protects the classic freedoms inserted in the sphere of non-State, ensuring formal equality without greater deontological concern with the promotion of material equality.

4. Liberal democracy and human rights

Democracy in its minimal contours, as widely propagated in Western Europe and America, has historically been so confused with liberal democracy that, at first, it seems tormenting to conceive liberalism without democracy or democracy without liberalism.

Defining liberal democracy as an unique mixture of individual rights and popular sovereignty, Mounk (2019, p. 44-45) decomposes the regime in its constitutive parts to define democracy as the set of electoral institutions with the power of law that translates people's opinions in public policies, conceptualizing liberal institutions as those that effectively protect the rule of law and guarantee individual rights - such as freedom of expression, religion, press and association - for all its citizens (including ethnic and religious minorities), reserving the term liberal democracy to define the political system - at the same time liberal and democratic - a system that both protects individual rights and translates popular opinion into public policies.

For Bobbio (2018, p. 35-38), democracy is characterized by a set of rules that establish who is authorized to make collective decisions and from which procedures, with the majority rule as a fundamental rule, always under condition that those who are called to decide, or to elect those who are going to decide, do so before real alternatives, guaranteeing them the rights of freedom, opinion, expression, assembly, association, that is, ensuring they have classic liberal rights, reason why he concludes, in line with the cohesion between liberalism and democracy, that the liberal State is the not only historical but legal assumption of the democratic State.

Urges to perceive in the definition of liberal democracy, among its main notes, much of its procedural character, in addition to the primacy for the protection of human rights of the first dimension, deeply identified with individualism, with classic freedoms, with state abstentionism, with liberal aspirations that founded modern constitutionalism.

According to Mounk (2019, p. 35), despite its shortcomings, most citizens, in recent times, seemed deeply committed to liberal democracy, because there did not seem to be a consistent alternative to it after the fall of the Soviet Union and the failure of communism.

Liberalism and democracy, however, despite the fact that for a long time they seemed to compose a cohesive and unbreakable whole, in a complementary relationship of mutual dependence, today, when more and more come to power supporters of populist ideas,⁶ seem to walk autonomous paths and no longer necessarily go hand in hand.

Hence Mounk (2018) referring to an illiberal democracy (democracy without rights) and to an undemocratic liberalism (rights without democracy), showing the dangers of this disintegration relationship for the survival of the democratic regime itself, a regime that, according to his understanding, continues at a pace of global shrinkage.

Many and varied are the causes of the growing decline of liberal democracies, the erosion of their values and the consequent rise of undemocratic and populist regimes, gravitating many of them possibly around the citizens' disenchantment and discontent with the political system.

Indeed, criticisms of the current democratic model are shown, notably accentuated by its liberal and procedural bias, criticisms that range from individualism, materialism and erosion of ethical values (MIRANDA, 2008, p. 49), up to the party fragility, the parliamentary disintegration and the economic and political colonization of the democratic space (MARTINS, 2007), going through the loss of the meaning of representativeness, the disrepute of parliaments and for the corporatism of the political class (AIETA, 2006, p. 123), and also for the breach of ethical standards, threatening the legality of the mandate and tarnishing popular representation with illegitimacy (AMARAL, 2001, p. 50).

⁶ For Mounk (2019, p. 10), in the preface to the first Brazilian edition of his work *The People vs. Democracy: why our freedom is in danger and how to save it*, what defines populism is its demand for exclusive representation of the people and it is this reluctance to tolerate opposition or respect the need for independent institutions that so often puts populists on a direct collision course with liberal democracy.

To these criticisms, adds Mounk (2018, p. 58-59), when talking about what he calls undemocratic liberalism, the sharp distance between political elites and popular opinion, considering that, in each world increasingly complex, the legislature, once one of the most important political bodies, “has lost much of its power to courts, to bureaucrats, to central banks and to international treaties and organizations”, reducing, increasingly, the ability of the people to exercise effective political influence.⁷

With the political participation of the people increasingly limited to the act of voting and with the perception of the insufficiency of classical freedoms for the maintenance of the regime, these freedoms notably grounded in individualism and in a merely formal equality, collapses, in large steps, liberal democracy.

Although Mounk (2019, p. 32) rightly affirms that the people has barely begun to understand what caused the existential crisis of liberal democracy, it seems reasonable to believe that much of its decline is due to the inability of liberal democracy to promote rights in their dimensions that go beyond classical political freedoms.

It is not enough for democracy to secure freedoms under the guise of formal equality. Democracy should promote material equality, protect minorities and build a solidary world, with peace and development.

While Mounk (2019, p. 20-23) seems to point out that in liberal democracy the rights of unpopular minorities are protected⁸ and that there are many control mechanisms in the regime created to reconcile the interests of different groups, there may still be a significant deficit in human rights in liberal democracies, and this may be one of the main causes of its continued decline.

It is not enough to characterize a regime as democratic, therefore, the occurrence of free elections, even when suitable (which is not always observed), not even the broad possibility of public contestation, nor the

⁷ On the loss of power from legislatures to courts, see: HACHEM; PETHECHUST, 2021; BRÍGIDA; VERBICARO, 2020; and HACHEM; PETHECHUST, 2020.

⁸ Fortman (2011) maintains that the numerical criterion is often not adequate for the division between majority and minority, given that it neglects one of the standards of the problem related to minorities, consisting in the abuse of dominant positions, often derived from the exercise of power economic, which can place, as history has shown, numerical minorities in a dominant position. For the author, therefore, in the real world, the problem of minorities resembles a problem of “us-them” division, and, therefore, legal questions about the definition of minorities must be set aside, paying special attention to implementation of human rights in a broader perspective of human dignity: “legalistic questions about the definitions of ‘minority’ [...] must be put to the side [...]. Human rights must be envisaged and implemented in a wider human dignity perspective”.

existence of opposition, nor the universal suffrage, nor the right of association, nor balanced political competition, nor civil liberties. All of this is important, but it has been shown to be insufficient, because, in the end, democracy must be conceived “as an egalitarian system in which average citizens can counterbalance the disproportionate influence of plutocrats and autocrats” (DALTON, 2017, p. 185).

If liberal democracy, at some historical moment, seemed to satisfy collective aspirations, today that impression has been undone, with liberal democracy losing its vigor that it once seemed to display.

As Dahl (2005) explains, full democracy involves other dimensions besides the wide possibility of public contestation and political participation in elections. Disregarding these factors is to support the argument of Abreu (2008, p. 193-194), according to which what is conventionally called democracy is the system of electoral participation of citizens through universal suffrage, a system previously regulated to legitimize political leaders, in which the governed and passive citizen only votes for one of the management proposals offered in the electoral market, with interests and commitments to this passive citizen, in general, the last to be considered in the process of query.

Although it is not a consensual notion, “the idea that there is a human right to democratic institutions is now a commonplace in international doctrine and practice” (BEITZ, 2009, p. 174). If it does not aspire to the promotion of human rights in a broader perspective, democracy, with all its freedoms already guaranteed, may soon, in an autophagic process, capitulate in the face of populism and its autocratic pretensions.

5. Conclusion: democracy with human rights and development

If human rights in their multidimensional archetype are confined to an environment of fragility and uncertainty in regimes where the mechanisms of social choices and definitions of public policies are primarily guided by market rules, individual and political rights of citizens are in a situation of extreme risk in regimes whose democratic traits, far from having the promotion of human rights in its broadest dimensions as a whole, boil down to shaping the electoral arrangements necessary to choose governors.

Paradoxical as it may be, the expensive values expressed in the classic freedoms that historically characterize democratic regimes are experiencing

an accelerated process of erosion under regimes whose democracy only in securing such freedoms is defined and sustained.

If democracy does not supplant the liberal paradigm and all its proceduralism, widening its horizons towards the large-scale promotion of human rights in its multidimensional structure, notably aiming at the satisfaction of economic, social and cultural rights and the construction of a materially egalitarian society, ventures to capitulate under rising populist regimes, which, often coming to power through free elections and with wide participation, take advantage of the deficit of human rights to annihilate minorities, segregate groups, marginalize dissenting thoughts, silence the press, and to attack the liberal political institutions themselves and their basic postulates, destroying liberal democracy.

Descriptive, minimalist and reduced to a mere procedural arrangement, without a firmer commitment to human rights, democracy can serve for any purpose, including undemocratic ends that could lead to its suicide.

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